Nos. 84-871, 84-889, 84-1054 and 84-1069

IN THE

Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION, *Appellant*,
vs.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA.

CALIFORNIA and PUBLIC UTILITIES COMMISSION OF CALIFORNIA, *et al., Petitioners*,
vs.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA.

PUBLIC UTILITIES COMMISSION OF OHIO, *et al., Petitioners*,
vs.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA.

FLORIDA PUBLIC SERVICE COMMISSION, *Petitioner*,
vs.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA.

ON APPEAL AND ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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REPLY BRIEF OF PETITIONERS IN NO. 84-889

POINT I. While The ICC Preserved Its Jurisdictional Options By Contending That Section 20(5) Authorized Preemption, It Delegated Its Depreciation Responsibilities To The States.

The respondents set the stage for their preemption claims by arguing that the Interstate Commerce Commission (ICC) in 1926 preempted the states' long-standing development of local depreciation charges (AT&T, 16 n.40; FCC, 27).[1] They are incorrect.

A. The ICC Did Not Attempt To Preempt The States' Jurisdiction Of Local Depreciation And Accounting Matters.

While various sections of the Interstate Commerce Act, expressly preempted state regulation (*e.g.*, Section 20(a)(7) regarding securities; Section 13(4)[2] concerning discriminatory pricing) Section 20(5), which addressed depreciation charges, failed to make the slightest reference to preemption, intrastate plant or local regulation. Thus, when the ICC was forced to address the preemption question, it preserved its options by alleging that Section 20(5) mandated preemption, but avoided judicial review by promptly delegating its depreciation responsibilities to the states. *Depreciation Charges of Telephone Companies*, 118 I.C.C. 295 (1926).[3]

[1] Citations to the briefs of the federal respondents (FCC), the private respondents (AT&T), GTE Service Corp. (GTE), the amicus brief of MCI Telecommunications Corp. (MCI), and to petitioners' initial brief (Calif.) will be set off parenthetically.

[2] If the ICC had any preemptive authority over local depreciation charges and accounting classifications, it arose from Section 13(4) which codified and expanded the 1914 "Shreveport Doctrine". *Houston East & West Texas, Railway Co. v. United States*, 234 U.S. 342 (1914). However, Section 13(4) limited the ICC's preemption power to circumstances involving discrimination. Congress purposefully deleted this provision from the Communications Act.

[3] In fact, the ICC did its best to leave *all* (intrastate and interstate) matters to the states. 118 ICC at 374.

When the FCC was created in 1934, the states therefore had exclusive control of depreciation and accounting matters for local ratemaking purposes.[4] As discussed in Points II and III, their authority was only *strengthened* by the Communications Act.

B. The Respondents' Reliance On Section 20(5) As Demonstrating The FCC's Power To Preempt Is Misplaced.

The respondents allege that Section 20(5) was "indisputably preemptive" (GTE, 14). However, as the FCC's original order acknowledged, "Supreme Court decisions relating to Section 20(5) of the Interstate Commerce Act never squarely addressed the question of the extent of the states' power to prescribe accounting and depreciation rules that supplement or deviate from rules prescribed by the ICC" (Cal. Pet. A-38).[5] It is understandable, therefore, that the respondents point not to an ICC order *exercising* preemptive authority, or a single judicial opinion interpreting the statute as preemptive, but to an argument by a NARUC representative who opposed the reenactment of Section 20(5) on the ground that it would allow the FCC to fix local depreciation charges (GTE, 14-17; AT&T, 20).

If one accepts the respondents' reasoning that by adopting a proposed statute Congress implicitly accepts the results predicted by its opponents, then it should apply the same logic to remaining provisions of the Communications Act. Such an exercise would establish, without further analysis, Congress's unequivocal support of the states' continued jurisdiction of local depreciation and accounting matters.[6] We suggest that the FCC was correct when it initially rejected such reasoning as speculative and beyond the material relevant to legislative intent (Cal. Pet. A-43).[7]

[4] Since the ICC issued no orders preempting the states' depreciation and accounting jurisdiction, GTE's reliance on the transition of ICC orders into the FCC's domain is unfounded (GTE, 26, n. 46).

[5] Even the FCC's subsequent *preemption* order acknowledged that "pre-1934 cases [were] . . . not disppositive" (Cal. Pet. A-64). Citations to the FCC orders and Fourth Circuit Opinion found in the Appendix to the California Petition for Certiorari are designated (Cal. Pet.).

POINT II. The FCC's Preemption Order Marks A 180 Degree Change Of Position From Its Past Reading Of The Act.

The respondents claim that for over half a century the FCC and state regulators have generally recognized the Commission's authority to preempt local depreciation and accounting matters (AT&T, 5, 11; FCC, 25). Nothing could be further from the truth.

Over the past 50 years, state commissions *and the FCC* have consistently interpreted Section 152(b)(1) as reserving local depreciation charges and accounting classifications to the states. California, for example, has set depreciation charges at variance with the FCC's charges for more than 25 years. There has been nothing secretive about the states' actions because neither they nor the Commission have ever had any question that the 1934 Act preserved dual regulation. *Pacific Tel. and Tel. Co. v. California Public Utilities Commission,* 401 P.2d 353 (Calif. 1965); *Accounting Treatment for Donations, Dues and Lobbying Expenditures,* 71 Pub.

[6] For example, Mr. Edward N. Nockels, a representative of the American Federation of Labor, suggested that the enactment of Section 221(b) would deprive the FCC of *all* jurisdiction over local telephone plant devoted to interstate communication. Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73rd Cong. 2d Sess. 199 (1934). Under the respondents' reasoning, Congress' enactment of Section 221(b) evidenced an intent to deny the FCC *all* jurisdiction of local plant. Lacking such jurisdiction, it certainly could not preempt intrastate depreciation and accounting matters.

[7] In any event, NARUC's concern with a potential threat from Section 220(b) was answered by the addition of Sections 220(j), 213(h) and 152(b)(1).

Util. Rep. (PUR) 441 (N.Y. PSC 1967); *New York Public Service Commission v. New York Telephone Company*, 20 Pub. Util. Rep. (PUR) 3d 129, 143 (N.Y. PSC 1956).

There are a wealth of FCC statements publicly acknowledging the states' right to set intrastate rates based on their own depreciation charges and accounting classifications. *In Re Amendment of Part 31 Uniform System of Accounts for Class A and Class B Telephone Companies*, 68 F.C.C. 2d 902, 906-7 (1978) (cited at Cal. Pet. A-46), contains the following Commission statement:

> *As everyone is aware*, different treatment is already given to a number of items for intrastate vs. interstate ratemaking as well as among the several state commissions for intrastate ratemaking. (Emphasis added).

Indeed, the FCC's Annual Reports, particularly in its early years, candidly acknowledged its reliance on the states in developing *interstate* depreciation charges and accounting classifications. 1938 F.C.C. ANN. REP. 32; 1940 F.C.C. ANN. REP. 34.

Moreover, in originally rejecting the request of AT&T and GTE to preempt local depreciation matters, the Commission acknowledged that preemption would mark a dramatic change in its past practices.

> *This Commission has never attempted to prevent any State commission from departing from our accounting and depreciation rules. Indeed we have expressly* recognized that the State commissions have a right to do so . . . [Preemption would] *repudiate nearly 40 years of administrative practice* and applicable state court precedents by adopting an interpretation of *Section 220* that would require an unwilling state commission to follow all accounting and depreciation methods prescribed by this Commission." (Emphasis added, Cal. Pet. A-45, 47).[8]

[8] Contrary to the implication of the FCC's brief, the Commission did not grant Section 220(h) waivers to states developing their own depreciation charges (FCC, 6).

Thus, the Commission was obligated in its preemption order to provide a "reasoned analysis" of its abrupt change in position. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2869 (1983). But it did not do so. As the Fourth Circuit dissent indicated:

> The FCC's post-hoc reinterpretation of legislative history, on which the majority here quite properly does *not* depend, combined with the unsupported and unsupportable statements as to the effect on competition of inconsistent state depreciation methods, do not provide even a modicum of reasoned analysis supporting the FCC's decision to interfere in state ratemaking after several decades of affirmatively espousing the opposite conclusions. (Emphasis added, Cal. Pet. A-23).

The FCC preempted in this case because it fell prey to AT&T's erroneous argument that the telephone industry needed more cash flow than state regulators were willing to provide (Cal. Pet. A-22).[9] It has *not* provided a "reasoned analysis" for its sudden change of practice.

POINT III. A Full Reading Of The 1934 Communications Act Leaves Little Doubt That Congress Intended To Preserve The States' Authority Over Local Depreciation And Accounting Matters.

Since no court had decided whether Section 20(5) authorized the ICC to preempt local depreciation and accounting matters, the provision's reenactment in Section 220(b) of the Communications Act expressed at most Congress's ambivalence toward the states'

[9] Considering that Congress has denied federal *courts* jurisdiction over intrastate rates, the FCC should hardly be allowed, as the dissent below correctly characterized the Commission's actions, to "impose different depreciation rates on intrastate equipment for the very purpose of . . . raising the intrastate rates" (Cal. Pet. A-24). See, 28 U.S.C. §1342 (Johnson Act).

continued jurisdiction over these activities.[10] However, the 1934 Congress did much more than simply reenact Section 20(5). It added provisions "to safeguard state regulation".[11] 78 Cong. Rec. S. 8823 (May 15, 1934) (statement of Sen. Dill). By their plain language it is evident that Sections 152(b), 213(h), and 220(j) were such provisions.

The basic flaw of the respondents' analysis is that it reads Section 220(b) in isolation from these sections.[12] Reading all parts of the Communications Act together and construing *each* provision consistently with all others, establishes clearly that the 1934 Congress reserved the regulation of local depreciation charges and accounting classifications to the states. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975).

[10] The states were, however, regulating local depreciation charges and accounting classifications when the FCC was created. Thus, Congressional ambivalence would not justify agency preemption. Indeed, preemption analyses in such instances "[s]tart with the assumption that the historic police powers of the states were not to be superseded. . .unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.* 105 S. Ct. 2371 (1985) (quoting *Jones v. Rath Packing Company*, 430 U.S. 519, 525 (1977)); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

[11] The respondents argue that the Court should give "special weight" or "defer" to the FCC's new interpretation of these provisions (ATT 12; GTE 7). However, the law is well-settled that where the Court, using traditional tools of statutory construction, finds Congressional authority addressing the questions at issue, the agency's statutory interpretation is entitled to no deference. *Chevron, U.S.A. Inc. v. National Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2781-82 & n.9 (1984); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2376 (1985) See 5 *Mezines, Stein and Gruff, Administrative Law*, §51.01[(1)] (1985). As discussed *infra*, application of traditional rules of statutory construction to Sections 152, 213(h), 220, and 410(b) leaves no question that Congress intended to preserve dual regulation of depreciation and accounting.

[12] In point of fact, it serves no purpose to analyze Section 220 without first recognizing its jurisdictional overlay, Section 152(b)(1).

A. Section 152 Establishes Concise Jurisdictional Guidelines For Interpreting The FCC's Powers Under Title II. The Guidelines Clearly Provide That The Commission's Depreciation And Accounting Authority Under Section 220 Applies To Interstate Carriers.

Section 152 carefully defines the FCC's jurisdiction over the three types of telecommunications carriers: (1) interstate common carriers; (2) intrastate connecting carriers; and (3) intrastate companies affiliated with interstate carriers. This jurisdictional overlay makes evident the Commission's lack of preemptive authority over local depreciation and accounting matters.

1. The FCC's Title II Jurisdiction Of Interstate Common Carriers Is Unfettered.

Section 152(a) grants the Commission broad jurisdiction over purely interstate companies including all of the regulatory powers found in Title II. Thus, the Commission's authority to set depreciation charges and accounting classifications *for these companies* is not at issue. It is clearly set forth in Section 220(b).[13]

2. The Commission's Title II Jurisdiction Of Connecting Carriers Is Limited To The Powers Found In Sections 201-205.

Section 152(b) describes the Commission's powers over connecting carriers and intrastate companies affiliated with interstate carriers. Section 152(b)(2) limits the Commission's Article II jurisdiction over connecting carriers to the powers found in Sections 201-205. Thus, connecting carriers are not subject to the Commission's depreciation and accounting powers, as enunciated in Section 220.[14]

[13] Recognizing that the FCC lacked the experience, expertise and funding to set interstate depreciation charges and accounting classifications in its early years, Congress gave it the discretion to delegate this responsibility to the states. Section 220(h). See 1938 FCC ANN. REP. 32.

[14] The respondents do not appear to contest this fact (Joint Appendix to the briefs on the Merits (JA) 12, ¶21).

With the divestiture of the Bell System and the imposition of court-ordered restrictions barring the former Bell System Operating Companies from providing interstate services, the Bell Operating Companies have become Section 152(b)(2) "connecting carriers." *United States v. Amer. Tel. & Tel.*, 552 F.Supp. 131 (D.D.C. 1982) *aff'd. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Thus, the Commission clearly lacks authority to preempt the states' regulation of these companies' local depreciation charges and accounting classifications. For this reason alone, the FCC preemption order must be overturned.

3. The Commission's Title II Jurisdiction Of Affiliated Intrastate Companies Is Defined By The Express Terms Of Section 152(b)(1).

Section 152(b)(1) defines the Commission's Title II jurisdiction over the operations of intrastate companies affiliated with interstate carriers. It provides that nothing in the Communications Act, "shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio. . .".[15] Thus, if Section 152(b)(1)'s reference to "charges" and "classifications" includes *depreciation* charges and *accounting* classifications, the Commission order under review is clearly unlawful, not only with regard to the former Bell System companies (connecting carriers) but also as to intrastate, affiliated companies.

The respondents argue that Section 152(b)(1) is inapplicable to depreciation and accounting. They allege that, although Section 152(b)'s six terms ("charges", "classifications", "practices", "services", "facilities", or "regulations") describe different activities throughout the Act, their meaning in Section 152(b) is restricted to a

[15] Sections 224 and 301, the two provisions of the Act not affected by Section 152(b)(1), are not relevant to this case.

single term—rate structure (FCC, 38-39; AT&T, 33-34). They offer three arguments to support their position: (1) Section 152(b)(1)'s language resembles that of Section 201-205 "where the Act describes the customer rates the FCC sets for interstate service"[16] (FCC, 39); (2) Section 152(b)(1) was merely intended to prevent application of the "Shreveport Doctrine" to telecommunications (GTE, 27);[17] and (3) Section 152(b)(1) is, in any event, a general statute and therefore cannot control the specific language found in Section 220 (AT&T, 31). Their arguments are patently wrong for several reasons.

a. The Respondents' Reading Of Section 152(b)(1) Violates Numerous Canons Of Statutory Construction, Including The Only Rule They Reference.

i. Every Word Of A Statute Should Be Given Meaning.

The respondents attribute *extreme* redundancy to Section 152(b)(1) in claiming that six terms of art "charges", "classifications", "practices", "services", "facilities" and "regulations" mean only one thing, customer "rates". Yet it is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.

> "As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "

[16] The respondents' claim that "charges", "classifications" and "practices" in Sections 201-205 mean "rate structure" is belied by Section 203(a) which requires common carriers to file with the Commission "classifications, practices and regulations affecting such charges". The terms clearly have different meanings.

[17] GTE's persistent misuse of legislative history makes it difficult to characterize its precise position on Section 152(b)(1). At one point in its brief, it argues that Section 152(b)(1) was "substantively indistinguishable" from Section 1(2) of the Interstate Commerce Act (although the statutes are entirely different) (GTE, 26). Yet, it later claims that Section 152(b)(1) was designed to override the *Shreveport Doctrine*—which Section 1(2) obviously did not do (GTE, 27, App. II-1).

Market Company v. Hoffman, 101 U.S. 112, 115-116 (1879). See also, *Kaibab Industries v. Parker,* 405 U.S. 989 (1972).

The respondents also ignore Section 152(b)'s crucial introductory language stating that "*Nothing in this chapter* shall be construed to apply or to give the Commission jurisdiction with respect . . ." (Emphasis added). If Section 152(b) is intended to be a jurisdictional overlay to Title II, it is irrational to assume that its reference to "charges" is inapplicable to Section 220's reference to the same term.

Further, Section 152(b) refers to charges "for or in connection with" the provision of services. If the latter phrase, "in connection with", is to have significance, then it must relate to something other than customer rates, *i.e.,* charges *for* service. The respondents would simply read the phrase "in connection with" out of the statute.

Respondents essentially argue that Section 152(b)(1) is insignificant because it is "purely residual and does not purport to *withdraw* any part of the comprehensive authority given the FCC by Section 2(a)" (GTE, 9). Their position is particularly improper considering the importance assigned to Section 152(b)(1) by the Act's legislative history. See, *e.g.,* 78 Cong. Rec. S. 8823 (1934) (statement of Sen. Dill); See generally (Calif. 1278).

ii. Technical Terms Should Be Read In Accordance With Their Industry Usage.

Another canon of construction ignored by the respondents is that technical terms in a statute should be interpreted by reference to the industry to which they apply. *Corning Glass Works v. Brennan,* 417 U.S. 188, 201 (1974). As indicated in our initial brief, the utility industry, state regulators, academicians, Congress, and the FCC have *all* traditionally used "charges",

"classifications, and "practices" to refer to depreciation and accounting (Calif. 14-15). These terms should therefore receive the same meaning in Section 152(b)(1).

iii. The Terms In One Portion Of A Statute Should Be Interpreted In Light Of Their Use In Other Portions Of The Statute.

The connotation of terms in one portion of a statute should be determined by reference to their use in other provisions. See, *Schreiber v. Burlington Northern Inc.,* 105 S. Ct. 2458, 2462 (1985). While the respondents cite this canon of construction to support their reading of Section 152(b)(1), they limit their comparative analysis to one portion of the Act (Sections 201-205) (AT&T, 32-33; FCC, 39).[18] Sections 213(h) (discussed in POINT III, C, *infra*), 220(b) and 410(b) make it abundantly clear that Section 152(b)(1)'s reference to "charges" and "practices" means more than simply customer rates.

Congress used "charges" to mean *depreciation* charges in seven separate places within Section 220(b). It is a standard rule of statutory construction that when the same term is used in different sections of a statute, and its meaning is clear in one section, it should receive the same meaning in others. *U.S. v. Nunez,* 573 F.2d 769 (2d Cir. 1978), *cert. denied* 436 U.S. 929 (1977). Thus, the term should receive the same meaning in Section 152(b)(1) which, again, is designed as a jurisdictional overlay to Section 220.

Section 410(b) authorizes the FCC to work jointly with the state commissions on activities subject to dual regulation. In listing the matters subject to cooperation, as opposed to preemption, Section 410(b) distinguishes

[18] Further, as discussed *supra,* they misread Sections 201-205. In addition to Section 203(a), which distinguishes between these terms, Section 202(b) defines charges as follows: "Charges, or services, whenever referred to in this chapter *includes* charges for, or services in connection with, the use of common carrier lines of communications" (Emphasis added). If "charges" includes, but does not equate to, charges for services (*i.e.,* customer rates) it must also have other meanings.

between "rate structures" and "charges and classifications." The respondents' claim that Congress used "charges and classifications" synonymously with "rate structure" is clearly without merit.[19]

b. Even The "Shreveport Doctrine", As Codified By Section 13(4) Of The Interstate Commerce Act, Distinguished Between "Rates", "Charges", and "Classifications".

In 1914, the Court upheld the ICC's authority to increase intrastate railroad rates which discriminated against persons or localities involved in interstate traffic. *Houston East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914). Congress thereafter codified and expanded the Shreveport Doctrine in the 1920 Transportation Act when it authorized the ICC to alter any "*rate*, fare, *charge*, *classification*, regulation or practice" discriminating against interstate commerce (Emphasis added). Transportation Act of 1920, Section 13(4); 49 U.S.C., §13(4).[20]

[19] The respondents' claim that Section 410(c) evidences Congressional intent to preempt local depreciation and accounting matters ignores 1) a 37-year time lapse from the passage of Section 152(b)(1) to Section 410(c); *and* 2) the fact that Congress in 1971 carefully limited the FCC's preemptive authority to "separations", notwithstanding the fact that the FCC had publicly indicated that it *lacked* jurisdiction to preempt on depreciation and accounting matters.

Respondents also point to Congress's recent consideration of a bill that would have overturned the preemption order at issue in this proceeding (FCC, 21). But the depreciation provision to which they refer was a minor provision in a bill addressing Congress's concern about the FCC's recent end user access charge decision. See *National Ass'n of Regulatory Utilities Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied 105 S. Ct. 1224 (1984). The so-called "Universal Service Preservation Act of 1984", designed to modify that decision, was passed by the House but failed to pass the Senate when the FCC announced its intention to modify its end user access charge decision on its own.

[20] While the Shreveport Doctrine recognized the ICC's authority to eliminate discrimination against persons or localities, Section 13(4) authorized "the removal of undue discrimination *against interstate commerce as a whole*" (Emphasis added). I.L. Sharfman, *The Interstate Commerce Commission*, 224 (1931).

Section 13(4)'s distinction between "rates", "charges", and "classifications" took on added significance when the utility industry sought its reenactment in the Communications Act. In 1930, the Couzens Bill attempted to apply Section 13(4) to the telephone business. A proposed Section 35(d), copied from Section 13(4), authorized the federal commission to adjust not only local "rates," but also "charges" and "classifications" discriminating against interstate commerce. S.6 71st Cong., 1st Sess. §35(d) (1929) (Couzens Bill). The states vehemently opposed the bill and it was summarily rejected by Congress.

Four years later, a more moderate, pre-enactment provision to H.R. 8301 attempted to apply a limited version of "Shreveport" to the states. Like the Couzens Bill, it worked off the language of Section 13(4), but it deleted any mention of "rates" while retaining Section 13(4)'s reference to "charges" and "classifications". H.R. 8301, 73rd Cong. 2d Sess. §12(d) (Confidential Committee No. 1) (January 11, 1934). Congress also rejected this provision.

Thus, Congress was certainly aware of the distinctions between the terms "rates", "charges" and "classifications" when it enacted Section 152(b)(1) as proposed by the states (Calif. 16 n.21). It afforded each term its generally accepted meaning and thereby preserved the states' jurisdiction of local depreciation charges and accounting classifications.

c. There Is No Conflict Between Sections 152(b)(1) and 220(b).

In arguing that Section 152(b)(1) cannot override Section 220(b), the respondents assume a statutory conflict which does not exist (AT&T, 31). As discussed *supra*, Section 220 makes no reference either to intrastate depreciation charges, uniformity, or preemption, but simply requires interstate carriers to file interstate depreciation charges consistent with FCC orders. Section 220(b) conflicts with Section 152(b)(1) only

if one interprets it as implicitly mandating the presumption of *local* depreciation charges. But statutes should not be read to conflict when they can be reconciled. See, *Citizens To Save Spencer County v. E.P.A.*, 600 F2d 844, 870 n.117-118 (D.C. Cir. 1979) (citing other cases).

The respondents' reading of Section 152(b)(1) ignores its plain language, its relationship to Title II, and its legislative purpose. It should be rejected.

B. Section 220 Reserves To The States Authority Over Local Depreciation And Accounting Matters.

Respondents read into Section 220 a grant of preemptive power to the FCC over depreciation matters. They are able to do so, however, only by ignoring the plain language of the statute, its legislative history, and the framers' presumption of a dual regulatory system. In doing so they posit an interpretation of Section 220 that is patently illogical.

1. The Plain Language Of §220 Contains No Grant Of Preemptive Power To The FCC But Rather Presumes A Dual Regulatory System For Depreciation And Accounting Matters.

a. Section 220(b) Contains No Grant Of Preemptive Power To The FCC.

Respondents argue that the "plain language" of Section 220(b) represents an affirmative grant of preemptive power to the FCC with respect to depreciation (FCC, 24; AT&T, 12-13; GTE, 11). But this analysis ignores Section 152(b)(1), which explicitly precludes the FCC from setting local depreciation charges. Just as the rate setting provisions of Section 205[21] do not represent a grant of authority to the FCC to set intrastate rates, similarly the depreciation and

[21] 47 U.S.C. §205.

accounting language of Section 220(b) does not authorize the FCC to prescribe depreciation charges and systems of accounts for intrastate ratemaking purposes.[22]

Unable to find the "plain language" necessary to support their arguments, respondents attempt to draw implications from the absence of contrary language. Thus, respondents point to Section 213(h), which explicitly prohibits FCC preemption with respect to valuations, as an example of Congress' proclivity to speak clearly where it intended to preclude preemption.

But, the explicit language of Section 213(h) only serves to confirm petitioners' analysis of Section 152(b)(1). Section 152(b)(1) does not specify a reservation of authority for the states with respect to "valuations." In the absence of a Section 152(b)(1) reference to valuations, therefore, it was necessary for the preservation of state autonomy to include a separate provision in Section 213 reserving to the states jurisdiction to value property used in intrastate communications[23] (See also Point III C).

b. The Language Of Section 220(j) Presumes State Authority Over Local Accounting And Depreciation Matters.

Not only does Section 220(b) contain no grant of preemptive power to the FCC over depreciation and accounting matters, the plain language of Section 220(j) presumes dual regulation of such matters. That section requires the FCC to "investigate and report to Congress as to the need for legislation to. . .harmonize the powers of the Commission and of State commissions" on depreciation and accounting matters. 47 U.S.C. §220(j).

[22] Indeed, the FCC concluded as much in its original order declining to find preemptive power. (Cal. Pet. A-34, ¶15).

[23] Similarly, where the provisions of Section 152(b)(1) did not encompass state regulation with respect to consolidation and mergers of telephone companies, Congress so specified in Section 221(a).

Respondents interpret this provision as presuming preemption (FCC, 30-31; AT&T, 18 n. 48).[24] But interpreting §220(j) as presuming preemption ignores the plain language of the section. For a need to "harmonize" federal and state depreciation and accounting powers could only arise if the states had such power in the first instance. Indeed the FCC itself originally pointed to the language of Section 220(j) as demonstrating an intent *not* to preempt the states on such matters (Cal. Pet. A-44).

2. Respondents' Contention That Section 220 Is Premised On Uniform Depreciation Prescriptions Is Belied By The Legislative History Surrounding Its Enactment.

Respondents argue that Section 220 as ultimately enacted essentially recodifies Section 20(5) of the ICA, thereby precluding state regulatory authority over depreciation matters (FCC, 2-27; AT&T, 15-16; GTE, 14). Not only do respondents erroneously attribute preemptive effect to Section 20(5) of the ICA, their analysis also ignores the addition on the states' behalf of subsections 220(h-j). A coherent reading of these subsections in light of their legislative history requires acknowledgement of a dual regulatory system for accounting and depreciation matters.

a. Congress Had To Respond To State Concerns For Preserving Their Own Regulatory Authority In Order To Ensure Passage Of The Communications Act.

As respondents have acknowledged, earlier efforts at drafting a Communications Act foundered on state

[24] They refer to this subsection as a "condensed" version of the Senate-passed provision which did in fact presume preemption. GTE, in support of a similar argument, cites what purports to be a statement by the House managers of the Conference Report on S.3285 describing this section as requiring the FCC " 'to investigate and report to Congress upon the desirability of legislation. . .permitting State commissions to prescribe their own percentage rates of depreciation and systems of accounts for carriers' " (GTE, 14). GTE is in error. In fact, the quoted language represents the managers' description of the *Senate-passed* version of Section 220(j) which the conferees and Congress ultimately rejected.

opposition (GTE, 8 n.9). Because they failed to satisfy the states' need for autonomy with respect to intrastate ratemaking, including control over intrastate depreciation and accounting matters, predecessors to what became the Communications Act of 1934 failed to achieve passage.[25]

b. In Response To State Concerns Congress Included Subsections (h), (i) And (j) In Section 220.

The depreciation and accounting provisions sought by the states took the form of subsections 220(h-j) in H.R. 8301 as introduced. Each of these subsections presumed dual regulation of accounting and depreciation matters.

i. Subsections (h) And (i) Defined A Role For The States In The FCC's Process Of Prescribing Interstate Depreciation And Accounting Classifications.

Respondents have interpreted subsections (h) and (i) as defining limited situations in which the states have regulatory authority over any depreciation matters. Thus, they interpret subsection (h) as precluding the exercise of state authority over any depreciation matter unless expressly permitted by the FCC in its discretion. And they interpret subsection (i) as detailing a consultation mechanism to be employed by the FCC in setting binding depreciation charges for the states (FCC, 31-32; AT&T, 13-14).

But such an interpretation defies logic. For it is inconceivable that the states themselves would have sought to include in the Act provisions with such limiting effect. And it is particularly nonsensical to think that they would have sought such provisions at the same time that they were urging adoption of subsection (j),

[25] See Hearings on H.R. 8301 before the House Interstate and Foreign Commerce Committee, 73rd Cong. 2d Sess. 139-140 (1934) (statement of John E. Benton, General Solicitor of the National Association of Railroad and Utility Commissioners).

containing an explicit prohibition against FCC preemption of their intrastate authority.[26]

If subsections (h-j) as introduced in H.R. 8301 are to be read in concert, subsection (h) must refer to the FCC's waiver of its own interstate depreciation and accounting prescription authority over certain carriers, and subsection (i) must refer to a process of consultation before the issuance of interstate depreciation and accounting orders by the FCC. Thus, the presence of subsections 220(h) and (i) in H.R. 8301 as introduced and as ultimately enacted assumes the existence of a dual regulatory system.[27]

It is also significant to note that provisions virtually identical to subsection 220(i) appear in both the Natural Gas Act (15 U.S.C. §717h(b), and the Federal Power Act (16 U.S.C. §825 a(b)), along with provisions explicitly reserving authority to the states over intrastate depreciation matters. Obviously, such consultative language in these statutes can only refer to consultation with the states over *interstate* depreciation prescriptions.[28]

[26] The FCC argues that AT&T pointed out these contradictions, resulting in the ultimate inclusion of modified subsection (j) (FCC, 32 n.30). But the contradictions AT&T was alleging, as discussed *infra*, were between subsection (b) on the one hand and subsections (h) and (j) on the other, *not* between subsections (h) and (j), themselves.

[27] Respondents argue that had Congress intended to make subsections (h) and (i) applicable only to interstate depreciation matters it would have done so as in sections 201(a), 203(a) and 214(a) of the Act (FCC, 24; AT&T, 13). But without the specific interstate reference in each of these unique situations, the grant of authority to the FCC would have exceeded that intended by Congress and been in conflict with Section 152(b). In any event, that task was accomplished in Section 220 through Section 220(j).

[28] Similarly, contrary to AT&T's contentions (AT&T, 13 n.33), subsections 220(d) and (g) also relate to the FCC's *interstate* authority.

ii. Section 220(j), As It Evolved During The Legislative Process, Presumed Dual Regulation Of Depreciation And Accounting Matters.

The third provision sought by the states was subsection (j), explicitly precluding preemption by the FCC with respect to depreciation and accounting matters. The states were not wedded to the particular language of paragraph (j) as introduced. All that they sought was "language which will leave the state commissions unhampered as to allowances to be made for depreciation cases involving intrastate rates." Hearings on H.R. 8301 before the House Interstate and Foreign Commerce Committee, 73d Cong. 2d Sess. 143 (1934) (statement of Mr. Benton). Section 220(j), as ultimately enacted, provided such assurances.[29]

c. The Senate-Passed Version Of Section 220 Provided No Role For The States In Depreciation And Accounting Matters.

AT&T resisted any role whatsoever for the states with respect to depreciation and accounting matters.[30] It opposed enactment of both subsections (h) and (j),

[29] GTE has suggested that Section 152(b)(1) cannot be read to encompass depreciation and accounting matters because that would make the inclusion of Section 220(j), as originally introduced, superfluous (GTE, 22). But such an analysis discounts the negotiating process that takes place during the course of legislative enactments. Simply put, the states sought to start with the strongest possible language. This is not an uncommon strategy where proponents of legislation assume there will be numerous compromises along the way.

Moreover the two Sections, Section 152(b)(1) and Section 220(j) as originally framed were not inconsistent. Rather, they complemented each other. This is in contrast to respondents' interpretation of subsections (h), (i) and (j) as originally introduced and ultimately enacted, under which subsections (h) and (i) on the one hand and (j) on the other would be mutually exclusive.

[30] The ICC expressed reservations about such state authority. Hearings on H.R. 8301 before the House Interstate and Foreign Commerce Committee, 73rd Cong. 2d Sess. 96 (1934) (statement of Comm. McManamy).

claiming that such provisions introduced " 'chaos' " into the process for setting systems of accounts and depreciation charges. Hearings on S. 2910 before the Senate Interstate Commerce Committee 73rd Cong. 2d Sess. 96 (1934) (statement of Mr. Gifford). The Senate, receptive to these arguments, removed the substance of both provisions, replacing them with language requiring the FCC to investigate and report to Congress on whether (1) FCC exceptions should be permitted and (2) FCC preemption should be abandoned.

d. Compromise Language For Section 220 Was Ultimately Adopted That Satisfied The States' Concerns.

The Senate and House conferees ultimately arrived at a format for Section 220 which satisfied the states' concerns with respect to intrastate depreciation and accounting matters. While the final version did not contain the original language proffered by the states, the reference in subsection (j) to harmonizing the powers of the FCC and the state commissions sufficed to create the necessary presumption of a dual regulatory system.[31]

In addition, the states had the protections afforded them by Section 152(b). These protections had been negated by the Senate revision of Section 220(j) because its specific language presuming preemption would have overridden the more general language of Section 152(b). Once Section 220(j) was revised to its final form and could be read consistently with Section 152(b), however, the states had a satisfactory compromise and therefore had no need to exercise their demonstrated ability to frustrate passage of an unacceptable version of the Act.

[31] Respondents also point to the fact that the conferees failed to include changes to subsections 220(a) and (b) that the states had sought for the purposes of clearing up ambiguity as to intrastate depreciation and accounting authority. But, again, the states in no way indicated that such changes were absolutely necessary. Hearings on H.R. 8301 before the House Interstate and Foreign Commerce Committee, 73rd Cong. 2d Sess. 144 (1934) (statement of Mr. Benton).

e. Congress Rejected An Explicit Prohibition Against Preemption Because It Wanted To Test The Workability Of Dual Regulation Over Depreciation And Accounting Matters.

Respondents place great emphasis on the conferees' rejection of the explicit language in subsection (j) prohibiting preemption. But their analysis ignores the process of legislative compromise. The language ultimately agreed upon clearly was in the nature of a compromise between the opposing sides. Congress was unwilling to permit preemption as the ICC and the utilities wanted and consequently rejected the Senate version of §220(j).[32] But it also was concerned about the workability of dual regulation of depreciation and accounting matters. It, therefore, required the FCC to scrutinize the results of the dual system and recommend any legislative changes it deemed necessary. The FCC has never complied with this provision.[33]

3. The Subsections of §220 Can Only Be Read As A Coherent Whole If A Dual Regulatory System Is Assumed.

AT&T opposed passage of the House version of the bill, alleging there were conflicts between subsections (h) and (j) and the remainder of Section 220 (FCC, 32). But AT&T alleged conflicts only because it failed to acknowledge a dual regulatory scheme.

[32] Respondents concede that the Senate version of Section 220(j) presumed preemption (AT&T, 18 n.47).

[33] Respondents also attempt to draw implications from the presence of explicit reservations of depreciation authority to the states in the contemporaneous measures, the Natural Gas Act (15 U.S.C. §717h(a)) and the Federal Power Act (16 U.S.C. §825(a)) (FCC, 28 n.26; AT&T, 14 n. 36). But, this ignores the compromise nature of the comparable Communications Act provision, Section 220(j). In addition, it should be noted that unlike section 152(b)(1), the general jurisdictional sections in these two Acts reserving power to the states (15 U.S.C. §717(c) and 16 U.S.C. §824(b)(1)) cannot be read to encompass a reservation to the states of authority over depreciation and accounting matters. Consequently, explicit reservation of authority to the states over these matters was essential.

Obviously the conferees did not accept AT&T's vision of a unitary system. Otherwise, they would have found it necessary to reject subsection (h) as well as the "harmonizing" language of subsection (j).

Indeed, it is the respondents' strained interpretation that is illogical. If respondents are correct in their analysis of the statute and of its legislative history, the states would have been seeking a provision that permitted them to set intrastate depreciation rates only with the approval of the FCC, at the same time that they were seeking an explicit prohibition against preemption. They would have been seeking a provision authorizing the FCC, after consultation with the states, to prescribe depreciation charges that would be binding on them for intrastate ratemaking purposes. And finally, an FCC report on the need to harmonize federal and state depreciation regulation would have been required even though the states had no regulatory authority in this area.

Once it is recognized, however, that Congress envisioned a dual regulatory system, the provisions of Section 220 fall into place. Section 220(b) grants the FCC authority to set interstate depreciation rates. Section 220(h) permits the FCC, in its own discretion, to except from its interstate depreciation and accounting prescriptions, carriers subject to state authority. Section 220(i) requires the FCC to consult with the states over interstate depreciation and accounting prescriptions, not because the states would be bound by those prescriptions, but because they had much more experience in the field and might be indirectly affected by them. And finally, Section 220(j), reflecting Congress' uncertainity about the workability of a dual regulatory system, requires the FCC to monitor that system and report back as to the need for further legislation to bring harmony to the overall regulatory scheme.

C. In Attempting To Preempt Local Depreciation Charges And Accounting Classifications The FCC Has Taken Unto Itself A Power Expressly Denied It By Section 213(h).

When the FCC was created in 1934, there was widespread acrimony over the correct method for valuing utility plant. *See, e.g., Missouri ex rel Southwestern Telephone Company v. Public Service Commission,* 262 U.S. 276, 288 (1923) (Brandeis, J., concurring); Hale, *The Fair Value Merry-Go-Round, 1898 to 1938; A Forty-year Journey From Rates-Based-on-Value to Value-Based-on-Rates,* 33 Ill. L. Rev. 517 (1939).[34] Thus, in accordance with its goal of safeguarding state regulation of local service, Congress expressly preserved the states' discretion to value local (separated) plant as they saw fit. 47 U.S.C. 213(h).

Since depreciation charges are designed to recover the value of utility plant over its expected life, the development of depreciation accruals (both in terms of percentages and actual charges) must start with plant valuation.[35] Section 213(h), however, expressly reserves local plant valuation to the states. Thus, in attempting to preempt the setting of local depreciation charges the FCC has taken unto itself a power expressly denied it by Section 213(h).[36]

[34] The debate came to an end in 1944 when this Court held in *FPC v. Hope Natural Gas Company,* 320 U.S. 571, 602 (1944) that regulatory agencies should not be confined to any specific ratemaking formula, provided the "end-result" of their action is "just and reasonable."

[35] It would be impossible to devise rational depreciation charges unrelated to investment. NARUC, *Public Utility Depreciation Practices* at 35.

[36] The attached appendix demonstrates how simply adjusting local plant valuation to reflect the de-averaged service lives assumed by ELG results in depreciation charges *identical* to those accrued under Straight Line Vintage Group depreciation. By directing that local rates reflect both ELG *and* specific charges, the FCC would deny the states the power to adjust plant valuation.

Section 213(h) defies a conclusion that Congress intended to grant the FCC preemptive authority. See *Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 223 (1983).

POINT IV. The Respondents' Arguments For Implying Preemptive Authority Run Contrary To Various Provisions Of The Act, Relevant Case Law, And The Public Interest.

The respondents contend that the general purpose language found in Section 151 offers a basis for *implying* Congressional intent to override the states' jurisdiction of local depreciation and accounting matters.[37] They are wrong for several reasons.

A. It Would Be Illogical To Imply Preemptive Authority From Either Section 151 or 152 Because The Act Contains Several Provisions Which Evidence Congress's Intent To Preserve The Dual Regulation Of Depreciation and Accounting.

This Court has held on several occasions that a Congressional intent to authorize preemption will not be found where an Act which, when read as a whole, *either* prohibits preemption, evidences Congress's willingness to tolerate dual regulation, or expressly withholds power essential to preemption. *New York Telephone Company v. New York Department of Labor*, 440 U.S. 519, 546 (1979); *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, *supra*. Section 152(b)(1) prohibits preemption; Section 220(j) evidences Congress's willingness to tolerate the effects of dual regulation; and Section 213(h), by assigning valuation authority to the states, expressly withholds from the FCC power essential to depreciation preemption.

[37] The respondents also argue that local depreciation and accounting preemption is "reasonably ancillary" to its Section 152(a) jurisdiction of interstate communications.

B. In Any Event, The General Language Of Section 151 and 152(a) Offers No Support For The Respondents' Theory That Congress Intended To Authorize The Commission's Preemption Of Local Depreciation And Accounting Matters.

This Court has previously held that general purpose language, such as that found in Sections 151 and 152(a), does not offer a basis for finding preemptive authority. *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 633-34 (1981); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963). Nonetheless, the respondents turn to Sections 151 and 152(a) as a basis for implying a Congressional intent to authorize preemption. To support their theory, they rely on a misreading of this Court's decision in *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984).

In *Crisp*, the Court held that a state ban on cable companies' retransmissions of alcoholic beverage commercials was preempted by federal regulation.[38] The portion of *Crisp* relied on by the appellants is a finding that the FCC's regulation of cable companies' commercials was "reasonably ancillary" to its broadcast powers. But there is a significant difference between the FCC's "ancillary" jurisdiction over broadcasting and its "ancillary" jurisdiction over telecommunications.[39] The Commission's telecommunications jurisdiction is subject to dual regulation (which creates a presumption against

[38] Unlike the facts of this case, where the FCC is attempting to override 47 years of dual telephone regulation, the state of Oklahoma in *Crisp* was attempting to circumvent a 10-year old FCC broadcasting regulation.

[39] The FCC's authority over broadcasting emanates from the 1927 Radio Act. The 1934 Congress viewed "the 'air waves' as a public resource to be utilized and regulated in the public interest. Basic to its approach was that radio broadcasting was subject to federal jurisdiction without regard to transmission over state lines in the traditional interstate commerce sense." *General Telephone Co. of Cal. v. FCC*, 413 F.2d 390, 398 (D.C. Cir. 1969).

infringement on pre-existing state regulation); its broadcasting authority is much more pervasive. *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 172-3 (1968). *Crisp* has no relevance to the Commission's "ancillary" jurisdiction over local telephone matters.

The FCC's attempt to distinguish *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n*, is unsuccessful (FCC, 20 n.18). Just as the Atomic Energy Act bifurcated regulation of nuclear generation, the Communications Act prescribes dual regulation of the telecommunications industry. As the Court stated in *Pacific Gas and Electric*, Congress's intention to tolerate the effects of dual regulation defeats any implication of preemptive authority to avoid such results.

> Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons. Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. *The courts should not assume the role which our system assigns to Congress.* (Emphasis added, 461 U.S. at 223).

The Court's language is particularly applicable here in light of Section 220(j) which orders the FCC to seek new legislation if its study demonstrates a need for preemption.

C. Preemption Would Be Detrimental To The Public Interest.

The Communications Act, its legislative history, relevant case law, and 47 years of FCC practice run directly counter to the respondents' "end-justifies-the-means" argument that preemption should be permitted because it will lead to a more technologically advanced telephone network. There is absolutely no evidentiary support for their allegations and, in fact, they are incorrect.

1. The Wisdom Of Congress's Decision To Preserve Dual Regulation Is Borne Out By 47 Years Of Experience.

As the Commission conceded shortly before issuing the opinion under review, dual regulation has never frustrated the implementation of its policies under Section 151, 152(a) or any other statute.

> No policy of this Commission would be furthered by requiring state commissions to adhere to the rules we have adopted for purposes of computing the *interstate* revenue requirement. . .We have found in this instance that federal regulation will not be frustrated if carriers maintain additional records for *intrastate* ratemaking purposes. (Emphasis added, Cal. Pet. A-30, 48).

Further, no party contests the fact that dual regulation has been incredibly successful in bringing about technologically advanced, cost effective, safe and adequate telephone service at reasonable rates.[40]

2. The Respondents' Suggestion That Preemption Is Needed To Immunize Local Depreciation And Accounting Matters From Political Influence Is Ill-Founded And Misleading.

The respondents argue nonetheless that preemption is needed to insulate depreciation and accounting regulation from local political pressure to minimize rates. Of course, it was state regulators who for years told the FCC that timely capital recovery would be "to the advantage of *consumers, regulatory bodies, utility operators* and *stockholders*" (Emphasis added). NARUC, *supra*, at 34. Nonetheless, the FCC until 1980 adamantly refused to give consideration to the remaining life method being used by some states.[41] It is ironic that the

[40] Even MCI Telecommunications Corporation, which filed a brief in support of the FCC, acknowledged that dual regulation has resulted in "dramatic technological advances in every area of the industry" (MCI, 9).

[41] The respondents' reference to an alleged reserve deficiency "pointed to" by an extra-record NTIA study is terribly misleading. The NTIA study did not calculate or even estimate a deficiency but simply referred to "some estimates" on the subject. See National Telecommunications and Information Administration (NTIA spc. Pub. 85-16) 142 (Dec. 1985). In any event, whatever deficiency does exist is due—at least in part—to the FCC's pre-1980 policies.

Commission now criticizes the states for refusing to adopt uniformly a depreciation methodology which it so long opposed.

All regulatory agencies are subject to pressure from the industries they regulate and the public using regulated services. To suggest, however, that state regulators are subject to more "political pressure" than the FCC, or that public influence is something to be avoided (while utility pressure apparently is not) is to lose sight of one's public responsibility.

3. The Respondents' Claim That Preemption Will Modernize Depreciation Ignores The Fact That "ELG" And "Remaining Life", Concepts Hailed By AT&T And GTE As Commission Innovations, Were Introduced Decades Ago.

Throughout their briefs, the respondents attempt to create an image of preemption permitting the FCC to usher in a new age of depreciation and accounting methodologies to replace antiquated practices long overused by state commissions (*E.g.*, AT&T, 6). Their position borders on flagrant deception.

There is absolutely nothing new about ELG or remaining life depreciation. ELG, like "Vintage Group", is a form of straight line depreciation. It was introduced well before World War Two under the label "Unit Summation Method" (JA-4, 26, 40), and it was heavily criticized as being impractical. Kimball, *The Failure of the Unit Summation Procedure as a Group Method of Estimating Depreciation*, Econometric, Journal of the Econometric Society, XII, No. 3 (July, 1945). The FCC's suddén adoption of ELG may represent a change in that agency's internal policies, but it is not a step toward "modernization."[42]

Similarly, states were using remaining life depreciation 25 years before the FCC preemption order. It is not an FCC innovation and it certainly does not "modernize"

[42] Thus, the Department of Defense opposed the FCC's adoption of ELG, indicating that it increased rates *without* improving the timeliness of capital recovery (JA 21).

depreciation.[43] Indeed, as the FCC acknowledged in adopting remaining life, it "is not, as such, a method; it is merely a further step in the calculation of depreciation rates and is a concept that is applicable to almost any method for calculating depreciation rates" (JA 31).

Finally, the FCC's claim that its preemption order will "modernize" depreciation is directly at odds with its earlier admission, in originally adopting ELG and remaining life, that depreciation issues "are not readily characterized as 'right' or 'wrong' " (JA 23). It was only after the Commission decided to impose these measures on the states that they became a panacea to the national telecommunications network (FCC, 12).

4. The Public Service Will Be Best Served By The States' Continued Regulation Of Local Depreciation And Accounting Matters.

While the states have serious conceptual problems with Equal Life Group depreciation,[44] they object most vehemently to the respondents' claim that a uniform depreciation policy is in the consumers' best interest.[45]

[43] MCI claims in its brief that nonuniform depreciation charges would result in jurisdictional cross-subsidies (MCI, 20-21). This problem has been easily avoided for the past 50 years by a simple tracking of depreciation accounting by jurisdiction.

[44] The respondents contend that "after the FCC issued its decisions in 1980 and 1981, none of the states sought judicial review of the new depreciation rules" (AT&T, 8). Indeed, the FCC suggests that the state commissions accepted its depreciation and accounting orders although they "clearly anticipated an immediate effect on . . . intrastate rates" (FCC, 11). In point of fact, the NARUC and California petitions for clarification and reconsideration demonstrate that the states assumed no preemptive effect from the FCC orders. When the Commission reversed its position and contended for the first time that its rulings would impact intrastate rates, the states not only instituted this proceeding, but brought other actions challenging the reasonableness of ELG. *Public Service Communication of Wisconin v. FCC*, No. 85-1258 (7th Cir. 1985).

[45] The FCC argues that "not one of the many parties involved in that [Fourth Circuit] proceeding sought a stay" (FCC 13, n.15). The New York State Department of Public Service, a party to the Fourth Circuit proceeding, moved the FCC for a stay on April 22, 1983 (CC Docket No. 79-105). The Commission denied the motion July 19, 1983.

Depreciation issues often turn on conditions (such as climate, demographics, customer demand, business climate, and potential competition) which vary widely among the states. State regulatory bodies are most familiar with these local conditions and therefore best able to develop sound depreciation policies relating to local plant.[46]

Conclusion

A full and consistent reading of the Communications Act leaves little question that the FCC's preemption order runs directly contrary to the will of the 1934 Congress. Sections 152(b)(1), 213(h) and 220(j) carefully preserve the states' exclusive jurisdiction of local depreciation and accounting matters.

The respondents' strained attempts to justify preemption in terms of 1) not what the law says, but what it doesn't say; 2) implied preemption; and 3) unfounded policy arguments are without merit. The Commission's order is unlawful and it should be overturned.

[46] Notwithstanding the FCC's assurances (FCC 15 n.38) it does not have nearly the staff to consider local conditions in setting depreciation charges. "[W]ith but four Depreciation Rate Engineers on the Common Carrier staff, it would be unfair to expect miracles" (JA 60).

Respectfully submitted,

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APPENDIX

The following exercise de-averages plant values to correspond to de-averaged services lives (under ELG) and results in depreciation charges identical to those resulting from the Straight Line Method.

Example A offers a hypothetical where a company places 5 units costing $3 each (totaling $15) into service and thereafter retires one unit each year for 5 years. Thus, the 5 units have an average service life of 3 years (15 years of total unit service divided by 5 units equals 3 year average). As shown in the example, the depreciation accruals which result are $5 (year 1); $4 (year 2); $3 (year 3); $2 (year 4); $1 (year 5).

In Example B, we de-average plant lives under ELG, but do not de-average plant values to reflect the variations in the assumed lives. This practice, which has been advocated by the utilities and adopted by the FCC, increases depreciation charges to the following $6.85 (year 1); $3.85 (year 2); $2.35 (year 3); $1.35 (year 4); and $.60 (year 5).

Example C takes the same hypothetical but de-averages plant values to correspond to the de-averaged equal life groups of Example B. In other words, it assumes that if unit 1 has only a 1 year life, it is worth less to the company than unit 5, which has a 5 year life. This simple adjustment results in depreciation accruals identical to those seen in Example A. There is no question that Section 213(h) authorizes such an adjustment to intrastate plant valuation.

Example A

Straight Line Depreciation

A vintage of 5 units are placed in service. Each unit costs $3.00 for a total of $15.

The life table characteristics are such that one unit is retired at the end of each year for 5 years. The average service life is therefore 3 years (3 yr. ASL). The depreciation rate assuming no net salvage is ⅓ or 0.33⅓.

YEAR 1 $15 x 0.33⅓ = $5 depreciation accruals during year one

At end of year one 1 unit is retired

Telephone Plant In Service (TPIS) = $15 - $3	= $12
Depreciation Reserve = $5 - $3	= $ 2
Net Plant (rate base)	$10

YEAR 2 $12 x 0.33⅓ = $4 depreciation accruals during year two

At end of year two 1 unit is retired

TPIS = $12 - $3	= $ 9
Depreciation Reserve = $2 + $4 - $3	= $ 3
Net Plant	= $ 6

YEAR 3 $9 x 0.33⅓ = $3 depreciation accruals during year three

At end of year three 1 unit is retired

TPIS = $9 - $3	= $ 6
Depreciation Reserve = $3 + $3 - $3	= $ 3
Net Plant	= $ 3

YEAR 4 $6 x 0.33⅓ = $2 depreciation accruals during year four

At end of year four 1 unit is retired

TPIS = $6 - $3	= $ 3
Depreciation Reserve = $3 + $2 - $3	= $ 2
Net Plant	= $ 1

YEAR 5 $3 x 0.33⅓ = $1 depreciation accruals during year five

At end of year five last unit is retired

TPIS = $3 - $3	= $ 0
Depreciation Reserve = $2 + $1 - 3	= $ 0
Net Plant	$ 0

Example B

ELG—No Valuation Adjustment

Using the same plant example as used in the Straight Line example—5 units placed in service at $3 each. One unit is retired at the end of each year.

				Depreciation Accruals
YEAR 1	Equal Life Group	1st unit $3 x 100%	=	$3.00
		2nd unit $3 x 50%	=	$1.50
		3rd unit $3 x 33⅓%	=	$1.00
		4th unit $3 x 25%	=	$0.75
		5th unit $3 x 20%	=	$0.60
		Depreciation Accruals	=	$6.85

At end of year one 1 unit is retired

TPIS = $15 - $3	=	$12.00
Dep.Res. = $6.85 - $3	=	$ 3.85
Net Plant (rate base)	=	$ 8.15

YEAR 2	Equal Life Group	1st unit out		
		2nd unit $3 x 50%	=	$1.50
		3rd unit $3 x 33⅓%	=	$1.00
		4th unit $3 x 25%	=	$0.75
		5th unit $3 x 20%	=	$0.60
		Depreciation Accruals	=	$3.85

At end of year two 1 unit is retired

TPIS = $12 - $3	=	$9.00
Dep.Res. = $3.85 + $3.85 - $3	=	$4.70
Net Plant	=	$4.30

Appendix—Example B—ELG—No Valuation Adjustment.

YEAR 3	Equal Life Group	1st unit out		
		2nd unit out		
		3rd unit $3 x 33⅓%	=	$1.00
		4th unit $3 x 25%	=	$0.75
		5th unit $3 x 20%	=	$0.60
		Depreciation Accruals	=	$2.35

At end of year three 1 unit is retired

TPIS = $6 - $3	=	$3.00
Dep.Res. = $4.70 + $2.35 - $3	=	$4.05
Net Plant	=	$1.95

YEAR 4	Equal Life Group	1st unit out		
		2nd unit out		
		3rd unit out		
		4th unit $3 x 25%	=	$0.75
		5th unit $3 x 20%	=	$0.60
		Depreciation Accruals	=	$1.35

At end of year four 1 unit is retired

TPIS = $6 - $3	=	$3.00
Dep.Res. = $4.05 + $1.35 - $3	=	$2.40
Net Plant	=	$0.60

YEAR 5	Equal Life Group	1st unit out		
		2nd unit out		
		3rd unit out		
		4th unit out		
		5th unit $3 x 20%	=	$0.60
		Depreciation Accruals	=	$0.60

At end of year five last unit is retired

TPIS = $3 - $3	=	$0.00
Dep.Res. = $2.40 - $0.60 - $3	=	$0.00
Net Plant	=	$0.00

Example C

ELG—Valuation Adjusted

Using the same plant example as used in the straight line example—5 units at $3 each placed in service and one unit is retired at the end of each year.

Valuation of Plant

Assumption: The value of plant is proportional to its service life. Therefore a unit of plant which is in service for 5 years is worth 5 times a unit of plant which is in service for only one year.

1st unit (retired at end of year 1) Valuation	=	$1
2nd unit (retired at end of year 2) Valuation	=	$2
3rd unit (retired at end of year 3) Valuation	=	$3
4th unit (retired at end of year 4) Valuation	=	$4
5th unit (retired at end of year 5) Valuation	=	$5
5 units at $3 each	=	$15

				Depreciation Accruals
YEAR 1	Equal Life Group	1st unit $1 x 100%	=	$1
		2nd unit $2 x 50%	=	$1
		3rd unit $3 x 33⅓%	=	$1
		4th unit $4 x 25%	=	$1
		5th unit $5 x 20%	=	$1
		Depreciation Accruals	=	$5

At end of year one 1 unit is retired

TPIS = $15 - $1	=	$14
Dep.Res. = $5 - $1	=	$ 4
Net Plant (rate base)	=	$10

Appendix—Example C—ELG—Valuation Adjusted.

YEAR 2	Equal Life Group	1st unit out		
		2nd unit $2 x 50%	=	$1
		3rd unit $3 x 33⅓%	=	$1
		4th unit $4 x 25%	=	$1
		5th unit $5 x 20%	=	$1
		Depreciation Accruals	=	$4

At end of year two 1 unit is retired

TPIS = $14 - $2	=	$12
Dep.Res. = $4 + $4 - $2	=	$ 6
Net Plant	=	$ 6

YEAR 3	Equal Life Group	1st unit out		
		2nd unit out		
		3rd unit $3 x 33⅓%	=	$1
		4th unit $4 x 25%	=	$1
		5th unit $5 x 20%	=	$1
		Depreciation Accruals	=	$3

At end of year three 1 unit is retired

TPIS = $12 - $3	=	$9
Dep.Res. = $6 + $3 - $3	=	$6
Net Plant	=	$3

Appendix—Example C—ELG—Valuation Adjusted.

YEAR 4	Equal Life Group	1st unit out		
		2nd unit out		
		3rd unit out		
		4th unit $4 x 25%	=	$1
		5th unit $5 x 20%	=	$1
		Depreciation Accruals	=	$2

At end of year four 1 unit is retired

TPIS = $9 - $4	=	$5
Dep.Res. = $6 + $2 - $4	=	$4
Net Plant	=	$1

YEAR 5	Equal Life Group	1st unit out		
		2nd unit out		
		3rd unit out		
		4th unit out		
		5th unit $5 x 20%	=	$1
		Depreciation Accruals	=	$1

At end of year five last unit is retired

TPIS = $5 - $5	=	$0
Dep.Res. = $4 + $1 - $5	=	$0
Net Plant	=	$0